(1)

90-736

No. ________

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

DONNA TEAGARDENER, CHARLES SEIPEL, W.C. WICKUM and GEORGE T. STICK,

Petitioners,

v.

REPUBLIC-FRANKLIN INCORPORATED PENSION PLAN, WILLIAM C. COOK, WILLIAM W. MATCHNEER and JOHN F. HELLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CARL GENBERG
6059 Memorial Drive
Dublin, Ohio 43017
(614) 228-2221

Attorney for Petitioners

QUESTION PRESENTED

Does this Court's decision in Firestone Tire & Rubber Co. v. Bruch, 499 U.S. 101, 109 S.Ct. 948 (1989), bar standing under ERISA, 29 U.S.C. 1132(a), to long-time employees and pension beneficiaries who challenge a scheme by self-dealing fiduciaries of a terminated pension plan to appropriate for themselves the plan's $1.2 million surplus?

LIST OF PARTIES

The parties to the proceedings below were Petitioners Donna Teagardener, Charles Seipel, W.C. Wickum and George T. Stick and Respondents Republic-Franklin Incorporated Pension Plan, William C. Cook, William W. Matchneer and John F. Heiler, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

No. ________

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

DONNA TEAGARDENER, CHARLES SEIPEL, W.C. WICKUM and GEORGE T. STICK,

Petitioners,

v.

REPUBLIC-FRANKLIN INCORPORATED PENSION PLAN, WILLIAM C. COOK, WILLIAM W. MATCHNEER and JOHN F. HELLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Donna Teagardener, Charles Seipel, W.C. Wickum and George T. Stick respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on August 6, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit issued August 6, 1990 (A-1) is not yet reported. The opinion of the United States District Court for the Southern Distriction of Ohio, Eastern Division issued August 16, 1989 (A-2) is not yet reported.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on August 6, 1990. The jurisdiction of this

Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

29 U.S.C. Section 1001(b) provides:

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries -

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. Section 1002(7) provides:

(7) The term "participant" means any employee or former employee of an employer, or any member or former

member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. Section 1024(b)(4) provides:

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may be regulation prescribe the maximum amount which will consti-

tute a reasonable charge under the preceding sentence.

29 U.S.C. Section 1132(a)(1)(B) provides:

(a) Persons empowered to bring a civil action -

A civil action may be brought -

(1) by a participant or beneficiary -

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

29 U.S.C. Section 1140 provides in relevant part:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan,...or for the purpose of interfering with the attainment

become entitled under the plan....The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

STATEMENT OF THE CASE

This action concerns the looting of a pension plan by the three plan administrators who obtained approximately $1.2 million of the residual assets to the exclusion of the rank and file employees. The Petitioners sought to bring a class action suit pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. Section 1001 et seq., against the pension plan sponsored by the company and the three administrators of the plan. In their Amended Complaint, Respondents sought to obtain benefits under 29 U.S.C. Section 1132(a)(1)(B) and under the pension plan agreement. The Petitioners sought a proportionate share of the residual assets. The Petitioners also sought relief against the three administrators of the pension plan for their failure to administer the plan in a non-discriminatory manner. The basis for Federal jurisdiction in the court of first instance was pursuant

to 29 U.S.C. Section 1132(e) and 28 U.S.C. Section 1331.

In January, 1983, Franklin Capital Corporation sold its subsidiary, Republic-Franklin Insurance Company, to an independent corporation. As a result of this sale, the 102 rank and file employees of the subsidiary were terminated and became employees of the acquiring company. The thirteen management employees were not terminated by Franklin Capital Corporation at that time. However, all management employees (with the exception of permanent retirees) also became employees of the acquiring company. At the time of this sale all of the approximately 115 employees were participants in a pension plan sponsored by Franklin Capital Corporation which was known as the Republic Franklin Incorporated Pension Plan ("RFIPP" or "Plan"). During this time period, the Plan was being administered by three of these management employees, the Respondents Cook, Matchneer and Heller.

In connection with the sale of the subsidiary, the individual Respondents perpetrated a scheme to obtain the benefit of the majority of the assets which had been contributed to the Plan. To effectuate the scheme the Respondents created a two-stepped Plan termination process. On January 14, 1983, a partial termination of the Plan was ordered by the Respondents which applied only to the 102 members of the class of former employees represented by the Petitioners.

The administrators also determined to purchase annuities for the 102 employees and the Plan would fund the annuities between January 18, 1983 and December 5, 1983. However, none of the 102 employees received any annuities until January, 1984, one year later. The amount of benefits which each of these former employees received in these annuities was to represent the accrued vested benefits that each of these individuals had under the Plan. After allowing for the funding of the annuities

for the class of former employees, RFIPP had assets of approximately $2.0 million remaining.

Thereafter, on July 20, 1983, Respondents Cook, Matchneer and Heller, acting in their capacity as members of the Executive Committee of the Board of Directors of Franklin Capital Corporation effectuated the second stage of this scheme by adopting an amendment to RFIPP that provided that any assets in excess of the funds needed for the accrued vested benefits of the participants would no longer revert to the corporation upon termination of the Plan. By its terms, this amendment was to be effective retroactively to January 1, 1980. Under the terms of the amended Plan, any residual assets of RFIPP on termination of the Plan were to be distributed for the benefit of the participants, former participants and beneficiaries.

Immediately thereafter, on July 21, 1983, the Plan, under the direction of the three individual Respondents, was terminated

and a second determination of the vested benefits was calculated. The vested benefits for the thirteen management employees were distributed by the Plan on August 8, 1984.

After allowing for the vested benefits of the thirteen management employees and for the funding of annuities to the 102 rank and file employees, the RFIPP had residual assets of approximately $1.4 million. Under the amendment effective January 1, 1980 these residual assets could no longer revert to the Plan sponsor, but instead would be distributed to the participants, former participants and beneficiaries of the Plan. However, these funds were allocated and distributed solely to the thirteen management employees. Respondents Cook, Matchneer and Heller received the benefit of approximately $1.2 million of the residual assets and the 102 individuals received nothing. Thereafter, this action was commenced in August 28, 1987, on behalf of the 102

individuals wherein they sought a proportionate share of the residual assets.

Respondents filed a motion to dismiss the Complaint on the grounds that the class of individuals represented by the Petitioners lacked standing to bring their claim under ERISA. The district court granted Respondents' motion holding that the class of individuals represented by the Petitioners were no longer participants in the pension plan and thus lacked standing to bring this action. Since the Petitioners had no reasonable expectation of returning to employment with the plan sponsor due to the sale of the subsidiary, the district court found that the Petitioners' participation in the pension plan had ceased "when annuities were purchased in payment of their accrued vested benefits as part of a partial termination of the plan." slip op. at p. 8-9 (A-2).

Petitioners appealed the district court decision to the Sixth Circuit Court of Appeals. The Petitioners sought reversal on

the grounds that the district court ruling was a misapplication of the law and an improper application of the facts. The Sixth Circuit Court of Appeals affirmed the district court.

Both the district court and the Sixth Circuit assumed that annuities had been purchased and distributed to the 102 rank and file employees prior to the final distributions to the Respondents. In fact, none of the class members ever received their annuities until January, 1984, at least a year after their partial termination and six months after the complete termination of the Plan. The Sixth Circuit misapplied the applicable law by finding that the Petitioners did not have a colorable claim to benefits. The court did not consider Petitioners' claim that the administrators discriminated against them in distributing the Plan assets. Finally, the Sixth Circuit refused to follow its own precedent and cases in other circuits which

[illegible]

have granted standing under circumstances similar to this case.

REASONS FOR GRANTING THE WRIT

1. The Sixth Circuit erred in failing to recognize Petitioners' colorable claim to benefits under 29 U.S.C. Section 1140. The decision of the Sixth Circuit in this case demonstrates the inequities inherent in existing case law interpreting the definition of "participants" under the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. Section 1001 et seq. In this case, the Sixth Circuit denied Petitioners standing to pursue claims for benefits under 29 U.S.C. Section 1132(a)(1)(B). The Sixth Circuit recognized the inequity of its holding, stating:

> "The result we reach in this case is compelled under the applicable law. We recognize that the actions of the plan administrators may appear to constitute unjust enrichment and that the plaintiffs appear to have been deprived of benefits that would have been

> theirs had the Plan been terminated earlier." slip op., at 14 (A-1).

The "applicable law" compelling the inequitable results in the Sixth Circuit's view stems from the misapplication of this Court's decision in Firestone Tire & Rubber Co. v. Bruch, 499 U.S. 101, 109 S.Ct. 948 (1989). Other circuit courts have granted standing under 29 U.S.C. Section 1132 under circumstances similar to those of the present case. In order to promote a uniform definition of participant under 29 U.S.C. Section 1132 among the circuit courts, Petitioners request this court to resolve this conflict.

ERISA and its legislative history emphasize Congress' intent to provide those protected by the Act "ready access to the federal courts," 29 U.S.C. Section 1001(b), and liberal remedies. Mitchell v. Mobil Oil Corp., 896 F.2d 463, 473 (10th Cir. 1990) (citing S.Rep. No. 127, 93d cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 4838, 4871; H.R. Rep. No. 533,

93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 4647.).

Senate Report No. 127, supra, of the Senate Labor and Public Welfare Committee states:

> "The enforcement provisions [of ERISA] have been designed specifically to provide both the Secretary [of Labor] and participants and beneficiaries with broad remedies for redressing or preventing violations of the [Act]....The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due participants."

The House of Representatives Report No. 533, supra, of the House Committee on Education and Labor provides:

> "The Committee recognized the absolute need that safeguards for plan participants be sufficiently adequate and effective to prevent the numerous inequities to workers under plans which [inequities] have resulted in tragic hardship to so many."

The present case represents exactly the type of inequitable administration of a

pension plan that Congress sought to remedy under ERISA. In this case Respondents Cook, Matchneer and Heller, Jr. were directors of Franklin Capital Corporation, administrators of RFIPP and participants in RFIPP. After discovering a substantial overfunding of the Plan, Respondents perpetrated a scheme to obtain the benefit of the majority of the assets which had been contributed to the Plan.

Respondents effectuated a two-step process to deprive the Petitioners of any share of the $1.4 million overfunding in the Plan which occurred as a result of the sale of the subsidiary. First, Respondents partially terminated the Plan by terminating 102 rank and file employees. After the partial termination, Respondents, acting as administrators, amended the Plan so that the Respondents would receive $1.2 million, as participants.

The sole purpose in effectuating the liquidation of the Plan in a two-step termination process was to deprive the rank

and file employees of their proportionate share of the residual assets. The result of the scheme was that the management/administrator/participants received $1.2 million while the rank and file employees received nothing. Surely Congress intended the rank and file members of the Plan to have access to the Federal courts in order to challenge such an inequitable, discriminatory distribution of Plan benefits.

Despite the compelling circumstances of this case, the Sixth Circuit denied petitioners standing under ERISA holding that they were not "participants" since they had been terminated prior to the complete termination of the Plan. Only "participants" and "beneficiaries," as those terms are defined under ERISA, have standing to pursue claims for benefits under 29 U.S.C. Section 1132(a)(1)(B). Under ERISA, 29 U.S.C. Section 1002(7), "participant" means:

> "Any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive <u>a bene-</u>

> <u>fit of any type</u> from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." (Emphasis added).

Petitioners respectfully submit that the 102 long-time rank and file employees were certainly those who might reasonably be expected to benefit from the Plan surplus.

2. The Sixth Circuit misapplied the definition of "participant" articulated in <u>Firestone Tire & Rubber Co. v. Bruch</u>, 499 U.S. 101, 109 S.Ct. 948 (1989) and, thereby, deprived employees who have been participants in RFIPP for twenty and thirty years standing to challenge the discriminatory allocation of Plan surplus upon termination of the Plan.

<u>Bruch</u> was decided to clarify the definition of "participant" under ERISA. The Petitioners in <u>Bruch</u> were never participants in the pension plan. The Petitioners were merely seeking information about a pension plan which they had never joined. Thus, the

Petitioners in Bruch were appropriately denied standing under ERISA. However, the Sixth Circuit has misconstrued the language and spirit of Bruch to deny twenty and thirty-year Plan participants standing to challenge the denial of benefits. Clearly this Court could not have intended the inequitable result herein when deciding Bruch. The Sixth Circuit recognized the inequitable result under what they perceived as the applicable law, stating:

> "The result we reach in this case is compelled under the applicable law. We recognize that the actions of the Plan Administrators may appear to constitute unjust enrichment and that the plaintiffs appear to have been deprived of benefits that would have been theirs had the Plan been terminated earlier." slip op. at 14 (A-1).

Now is the time for this Court to clarify the standing provisions.

Recently, this Court interpreted the requirements of a participant under 29 U.S.C. Section 1002(7) in an action involving a request for information made by former employees to a plan administrator of

an unfunded employee benefit plan under 29 U.S.C. Section 1024(b)(4). In Firestone Tire & Rubber Co. v Bruch, 499 U.S. 101, 109 S.Ct. 948 (1989), the employer sold five plants to another company. At the time of this sale, the plants employed 500 salaried personnel, most of whom were rehired by the acquiring company without interruption in service on the job and under the same conditions of employment. Six of these salaried employees then sought benefits from the former employer, Firestone, under that company's termination pay plan, and also sought information concerning the benefits under other qualified plans. This request for benefits was subsequently denied by the company's Plan Administrator and the request for information under 29 U.S.C. Section 1024(b)(4) was also rejected. The former employees then filed suit under ERISA seeking this relief.

In Bruch, the Supreme Court reviewed, inter alia, whether the Court of Appeals was

correct in holding that a party who merely claims to be entitled to a benefit under a plan covered by ERISA meets the requirements set forth in 29 U.S.C. Section 1132(a)(1) for bringing suit for benefits "by a participant or beneficiary." In finding that the standard imposed by the Court of Appeals was not appropriate, the Court held as follows:

> "In our view, the term "participant" is naturally read to mean either "employees in, or reasonably expected to be in, currently covered employment," Saladino v. I.L.G.W.U. National Retirement Fund, 754 F.2d 473, 476 (CA2 1985), or former employees who "have ... a reasonable expectation of returning to covered employment" or who have "a colorable claim" to vested benefits, Kuntz v. Reese, 785 F.2d 1410, 1411 (CA9) (per curiam), cert. denied, 479 U.S. 916 (1986). In order to establish that he "may become eligible for benefits," a claimant must have a colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future. "This view attributes conventional meanings to the statutory language since all employees in covered employment and former employees with a colorable claim to vested benefits 'may become eligible'. A former

> employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits, however, simply does not fit within the [phrase] 'may become eligible.'" Saladino v. I.L.G.W.U. Nat'l Retirement Fund, 754 F.2d at 476.

Id. at 958. Having made this ruling that the standard used by the Court of Appeals was inappropriate, the Court remanded this case to that Court for a determination of whether the former Firestone employees were participants under 29 U.S.C. Section 1002(7). The Court specifically stated that it was expressing no view as to whether under the facts in Bruch, the former employees were participants entitled to bring suit for benefits under ERISA.

It is undisputed that on January 14, 1983, a partial termination of the Plan was made by the Plan administrators and thereafter the benefits of the 102 individuals represented by the Petitioners were determined as provided under Article IV of the Plan. However, this determination of Petitioners' benefits by the Plan admin-

istrators should not deprive the Petitioners of standing to challenge the administrators' discriminatory conduct and breach of loyalty to all the Plan participants. The action of terminating the Plan in a discriminatory manner is the violation of ERISA that petitioners seek to remedy. To deny Petitioners standing because they were involuntarily and purposely terminated in the first step of a two-step process by the Plan administrators raises form over substance and undermines the remedial purpose of ERISA.

Similarly, the prior termination of the 102 employees by the administrators should not deprive the Federal court of jurisdiction in a subsequent action to ascertain whether the terminated employees were paid all the benefits they were entitled to under the Plan, namely, their proportionate share of the residual assets in the Plan. In denying standing, the Sixth Circuit stated:

> "Explicit in the Supreme Court' definition of 'participant' in Bruch is a requirement that the plaintiffs prove either that their right to assets has 'vest-

> ed; or will 'vest.' The plaintiffs cannot provide in this case that their right to the residual assets has vested or will vest, because they were terminated from the Plan before the residual assets vested in remaining Plan participants." slip op. at 6 (A-1).

Under Bruch, the Sixth Circuit should have focused upon whether the Petitioners have "a colorable claim" to vested benefits. The Petitioners sought relief against the Plan administrators for their failure to administer the Plan in a non-discriminatory manner and for their breach of fiduciary duty. Therefore, if the partial termination was a violation of ERISA, Petitioners would have a colorable claim for vested benefits.

The Seventh Circuit Court of Appeals has reached the same conclusion in interpreting the meaning of a "colorable claim to benefits." Sladek v. Bell Sys. Management Pension Plan, 880 F.2d 972 (7th Cir. 1989). In that case the wife of a participant sought to set aside her husband's pension election as voidable due to incompetency. Mr. Sladek, a participant, elected to forego

a survivor annuity option (for Mrs. Sladek) offered by the plan in order to receive full pension benefits during his lifetime. Mrs. Sladek brought suit as a potential beneficiary pursuant to 29 U.S.C. Section 1132(a)(1)(B), alleging that Mr. Sladek suffered from Alzheimer's disease at the time he declined the survivor annuity and was incompetent to make a valid election.

The district court dismissed the complaint on the ground that Mrs. Sladek was not a beneficiary under the Act and therefore lacked standing to challenge the validity of the election. The Seventh Circuit Court of Appeals reversed, stating:

> "In the instant case, the district court terminated its analysis upon a superficial reading of the complaint. The plaintiff was not 'designated... as a beneficiary' by her husband and therefore lacked standing....If the district court had followed the approach taken in Allen, it would have examined the validity of the underlying agreement (in this case, the election by Mr. Sladek) which deprived the appellant of standing. If the agreement, i.e. the election, is voidable, the

> appellant might well have standing as a beneficiary under the Act." Id. at 977.

The court then stated "that a claimant need only have a 'colorable claim' that he might prevail" to have standing. Sladek, at p. 979 (citing Firestone Tire & Rubber Co. v. Bruch, supra.). The Seventh Circuit concluded that the district court assumed the very matter at issue, the validity of the election.

As did the district court in Sladek, the Sixth Circuit assumed the very matter at issue, i.e. the validity of the partial termination of the Plan by the administrators. If the Sixth Circuit followed the Sladek approach, it would have first examined the validity of the administrators' actions under ERISA to determine whether Petitioners had a colorable claim to benefits.

ERISA Section 510, 29 U.S.C. Section 1140, prohibits "any person to...discriminate against a participant...for the purpose of interfering with the attainment

of any right to which such participant may become entitled under the plan...." The Petitioners have asserted a colorable claim under ERISA Section 510. The Plan administrators terminated the Plan in a two-step liquidation. The sole purpose of the two-step liquidation was to deprive the rank and file employees of their share of the over-funding. The Petitioners have alleged facts sufficient for a cause of action under 29 U.S.C. Section 1140. Under 29 U.S.C. Section 1140, a violation of that Section is enforceable under 29 U.S.C. Section 1132.

In Saporito v. Combustion Engineering, Inc., 843 F.2d 666 (3d Cir. 1988) the Third Circuit Court of Appeals permitted standing to demonstrate that former employees would have had standing as participants absent Combustion Engineering's actions. In Saporito the appellants filed an action under ERISA alleging discrimination and breach of fiduciary duty. The appellants alleged that Combustion Engineering discriminated against them in violation of

ERISA Section 510, 29 U.S.C. Section 1140, by telling other employees of the second plan (VSIP), while at the same time inducing appellants to retire under the first plan (VESP). Appellants asserted that they would have been participants in the second plan (VSIP) but for Combustion Engineering's fraudulent activity, and thus that they have standing as participants in the second plan. The district court dismissed the case for lack of standing. The Court of Appeals reversed, stating:

> "This is not an instance where plaintiffs simply alleged that the employer did not inform the employees of a plan in development. Instead, appellants here argue that C-E induced appellants to retire under the VESP, while secretly informing some individuals of the more lucrative VSIP. By its very nature, a Section 510 claim will often involve employees who claim that they did not receive benefits because of the employer's actions, and thus were denied an opportunity to become 'participants' in the benefits. To require that the employees have the status of participant where they allege that the employer's acts effectively deprived them

> of such status would undercut the provision and cannot have been intended by Congress.
>
> We therefore conclude that appellants have standing to demonstrate that they would have been participants absent C-E's actions." Id. at 672.

The facts in Saporito are similar to the present case, however one distinction can be drawn. The former employees in Saporito retired voluntarily, whereas the Petitioners in this case were involuntarily terminated only months before the final termination of the entire Plan as part of Respondents' scheme to keep the $1.4 million overfunding for themselves. But for the Respondents' discriminatory partial termination of the Plan, Petitioners would have been participants in the Plan when the residual assets were distributed. But for the Respondents' breach of loyalty to the Plan participants, the Petitioners would have received their proportion share of the $1.4 million overfunding. The Petitioners, at the very least, should be permitted to challenge the validity of the Plan admin-

istrators' discriminatory two-step termination of the rank and file employees in order to deprive them of their share of the overfunding.

3. The Sixth Circuit also erred by not following precedents in which other circuit courts have permitted standing under similar circumstances. A former employee can be a participant in a pension plan if he is or may become eligible to receive a benefit of any type from an employee benefit plan. 29 U.S.C. Section 1002(7). Prior to Bruch, several circuit courts examined whether former employees who voluntarily retired and received lump sum retirement benefits had standing to seek the increased payment later made to retirees or to challenge changes in the retirement plan. The courts concluded that former employees do not have standing under those circumstances. See Kuntz v. Reese, 785 F.2d 1410 (9th Cir.), cert. denied 479 U.S. 916 (1986); Yancy v. Am. Petrofina, Inc., 768

F.2d 707 (5th Cir. 1985); Joseph v. New Orleans Elec. Pension & Retirement Plan, 754 F.2d 628 (5th Cir.) cert. denied, 474 U.S. 1006 (1985); Saladino v. I.L.G.W.U. Nat'l Retirement Fund, 754 F.2d 473 (2d Cir. 1985). However, more recently the Fifth and Ninth Circuits have distinguished their earlier decisions and permitted former employees who had already received their accrued benefits to bring actions under ERISA.

In Sommers Drug Stores Employee Profit Sharing v. Corrigan, 883 F.2d 345 (5th Cir. 1989) the plaintiff employees accepted a lump sum distribution of their benefits upon the termination of the plan. The trust sold all its assets including stock and distributed the cash to the participants. The participants unanimously approved the sale of the stock by the trust and its subsequent liquidation. Several years later the former participants sought to challenge the price received for the stock by bringing a breach of fiduciary duty

action under ERISA, 29 U.S.C. Section 1132. The Respondents challenged Petitioners' standing under the Fifth Circuit's earlier decisions in Yancy, supra, and Joseph, supra, stating that a participant who accepts his benefits in a lump sum no longer has standing to sue under ERISA.

The Fifth Circuit, refusing to give its previous decisions such a broad reading, granted standing to Petitioners. The court stated:

> "In Yancy it is conceded that the lump sum received was the full amount due under the terms of the plan in effect when the plaintiff retired. In Kuntz the plaintiffs also had received the full amount of their vested benefits under the plan (even if not as it had been represented to them). Here the class representatives claim that the amount received was not the full amount of vested benefits due under the terms of the profit sharing plan, but was less, because the amount received for the shares was less than fair market value. If the class prevailed on its claims, the representatives would be 'eligible to receive a benefit' - the remainder of what was owed them and should have been paid to them at the time they received their lump sum settlement. It

> must be remembered that the stock was sold as a step in a planned liquidation of the trust with distribution to the class. It is plain that here the class members seek their share of the difference between the price the representatives received for their shares and the fair market value of those shares at the time they were sold. In other words, the representatives have a claim for an ascertainable amount allegedly owed them at the time they received their lump sum. We do not believe that Congress intended to deny such plaintiffs standing to sue under ERISA."

In this case, the Petitioners never received their annuities until six months after the complete liquidation of the trust. Some of the annuities were not even purchased until December, 1983 after the complete liquidation of the Plan. As in Sommers Drug Stores, the Petitioners only seek "an ascertainable amount allegedly owed them at the time they received their lump sum." They are seeking "benefits of any type."

In a suit similar to the present action, the Ninth Circuit held that a group of employees were still participants and

beneficiaries in a voluntary employee benefit plan after they received their actuarially vested benefits "when one of the plan fiduciaries allegedly caused the plan to be 'terminated' and then collected the plan's surplus assets." Amalgamated Clothing & Textile Workers v. Murdock, 861 F.2d 1406, 1418 (9th Cir. 1988). In Amalgamated, the plaintiffs alleged that the plan administrator, who was also the plan sponsor amended the benefits plan so that any surplus assets in the plan at termination would revert to the plan sponsor. Thereafter the administrator terminated the benefits plan and paid the participants their vested benefits. Id. at 1409.

Once the vested benefits were paid, the surplus assets were then reverted back to the plan sponsor. After receiving their vested benefits as calculated under the benefits plan, the Amalgamated plaintiffs brought suit to obtain a proportionate share of the surplus assets and to void the re-

version to the plan sponsor of their assets. In finding that these plaintiffs had standing as participants to bring suit under ERISA, the Court stated the following:

> "In the circumstances of this case, were we to hold that payment of plan benefits cuts off the standing to sue of plan beneficiaries, we would, in effect, be saying that a fiduciary who (1) breaches the duty of loyalty to an ERISA plan, and (2) seeks to profit personally from that breach by terminating the plan, has power to deprive plan beneficiaries of standing to sue the fiduciary for misuse of plan assets. Put simply, if under the circumstances of this case plaintiffs are denied standing, then fiduciaries may misuse ERISA plan assets and--by paying benefits and terminating the plan--personally profit from their breach of duty of loyalty and insulate themselves from liability. Schemes like the one alleged in this case would be encouraged rather than deterred.
>
> Kuntz does not approve such a result. We therefore hold that, for the limited purpose of granting plan participants and beneficiaries standing to sue in cases such as this one, ill-gotten profits held in a constructive trust for plan participants and beneficiaries may be construed as equitably vested benefits under an ERISA plan. Even after plan participants and beneficiaries have re-

> ceived their actuarially vested benefits from the plan, the plan should be viewed as continuing to exist for the purpose of distributing the equitably vested benefits." Id. at 1418-1419.

The Ninth Circuit reasoned that the right to sue a plan administrator who develops a scheme to deprive the rank and file participants in a plan of any proportionate share of the residual assets by paying the vested benefits prior to the plan termination, is not affected by the termination of the plan. Instead the Amalgamated Court determined that equity would not permit a fiduciary such as the plan administrator to profit from the termination of the plan by first paying the benefits to participants and thereafter directing the residual assets in the plan to himself. Any other conclusion would have permitted the plan administrator to develop schemes for personal profit which violate his duties under ERISA to treat all participants of a plan in a non-discriminatory manner and thereafter insulate himself

from claims by unilaterally paying the vested benefits of the participants. Id. at 1418.

The Sixth Circuit itself has recently recognized and applied Amalgamated. In Rosenbaum v. Davis Iron Works, No. 88-1245, slip op. (6th Cir. April 19, 1989) (per curiam), a plaintiff sought to obtain a prorata share of the overfunding of a defined benefit pension plan after he had already received all of his benefits from the plan. The Sixth Circuit found that an individual remains a participant in a qualified plan after receiving the benefits calculated by the plan administrator in order to seek a proportionate share of residual assets in the event of overfunding. In reaching this conclusion, this court cited with approval the holding in Amalgamated Clothing and Textile Workers v. Murdock, supra, that a plan administrator should not be permitted to profit and receive the residual assets simply because

the vested benefits under the Plan have been paid to the other participants.

As in the present action, the defendant in Rosenbaum argued that the plaintiff lacked standing as a participant to bring an action under ERISA to obtain a proportionate share of the residual assets by claiming that the plaintiff had received all of his benefits under the plan. However, this position was expressly rejected by the Court which held as follows:

> "Even someone who has ostensibly received all his benefits should be able to sue in a case such as this because the suit is for benefits the claimant was allegedly entitled to under the plan. Any other ruling would allow plan administrators to take benefits from plan recipients and then become immune to suit by paying beneficiaries some of the benefits to which they were entitled, while falsely representing that the amount paid was the full amount of the benefits due." Id. at p. 8-9.

The Rosenbaum court found that a plaintiff has a colorable claim for benefits when he is asserting that his benefits were improperly determined because no pro rata

share of the residual assets was included. Otherwise, a plan administrator would be able to circumvent the rights of the participants without fear of judicial review by paying whatever benefits the administrator determined was due.

In the case below, the Sixth Circuit distinguished Amalgamated on the ground that the residual assets were not created by illegal means as in Amalgamated. The Sixth Circuit stated:

> "The theory behind the holding in Amalgamated Clothing is inapplicable to this case. The Ninth Circuit 'equitably' vested residual assets in plan participants to allow those participants to seek legal recourse against the plan fiduciaries, in an effort to combat illegal activities of plan administrators...."

The Sixth Circuit failed to recognize that this is a case of breach of fiduciary duties and discrimination by the Plan administrators. Although the residual assets were not accumulated by illegal means, the two-step termination of the Plan violated ERISA. Specifically, the Plan

administrators breached their duty of loyalty to all participants and distributed the residual assets in a discriminatory manner. Thus, the Sixth Circuit should have applied Amalgamated Clothing in this case as it did in Rosenbaum. The residual assets in Rosenbaum were not obtained illegally either, but the Sixth Circuit applied Amalgamated Clothing in Rosenbaum. The Sixth Circuit erroneously disregarded its prior decision in this case.

CONCLUSION

In enacting ERISA, Congress sought to provide comprehensive legislation permitting employees broad remedies where they have been denied benefits or discriminated against. The appalling conduct of the Respondent Plan administrators is exactly the sort of conduct Congress intended to combat with ERISA. The Respondents, by breaching their duty of loyalty and discriminating against the rank and file employees, have enriched themselves with

$1.2 million of Plan surplus. The rank and file employees were denied any portion of the overfunding in the Plan solely as a result of the discriminatory distribution scheme of the Plan administrators.

Recognizing the injustice and gross inequity of the situation, the employees sought to remedy the situation in the courts. Because of the unsettled case law interpreting the definition of a "participant," these employees have been denied standing to challenge their termination and proper allocation of benefits from the Plan. Clearly, this is not the result intended by Congress in enacting ERISA. Further, this Court could not have intended that Bruch be used to deny 20 and 30-year participants in a pension plan standing to even question the proper determination of their pension benefits.

This Court can remedy the injustice resulting from the misapplication of Bruch below and prevent future abuse by other plan administrators by reviewing this case and

clarifying the definition of "participant" for purposes of standing under ERISA. Under similar facts, several other circuit courts have granted standing to Petitioners. The need for a uniform interpretation of "participant" is becoming painfully obvious, particularly to the hundreds of employees that are denied standing to question the unfettered discretion of Plan administrators.

Respectfully submitted,

CARL GENBERG
6059 Memorial Drive
Dublin, OH 43017
(614) 228-2221

Attorney for Petitioners

November 1990

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

No. 89-3865

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONNA TEAGARDENER, et al., *Plaintiffs-Appellants,* v. REPUBLIC-FRANKLIN INCORPORATED PENSION PLAN, et al., *Defendants-Appellees.*	ON APPEAL from the United States District Court for the Southern District of Ohio

---

Decided and Filed August 6, 1990

Before: WELLFORD and BOGGS, Circuit Judges; and GILMORE, District Judge.*

BOGGS, Circuit Judge. Plaintiffs, formerly members of the Republic-Franklin Incorporated Pension Plan (the Plan), sued the Plan and its administrators, William C. Cook, William W. Matchneer, and John F. Heller, Jr. (collectively, the Plan Administrators), to recover their proportionate shares of certain residual assets in the Plan. The district court dismissed the complaint for lack of standing, finding that the

---

*The Honorable Horace W. Gilmore, United States District Judge for the Eastern District of Michigan, sitting by designation.

plaintiffs were no longer "participants" or "beneficiaries" in the Plan, as those terms are defined in the Employee Retirement Income Security Act (ERISA), at the time the residual assets vested in the participants in the Plan. We affirm.

I

On January 1, 1983, Republic-Franklin Incorporated, sponsor of the Plan, sold Republic-Franklin Insurance Company to Utica National Insurance Group (Utica). Republic-Franklin Incorporated then changed its name to Franklin Capital Corporation (Franklin Capital). Immediately prior to the sale, 115 employees of Republic-Franklin Incorporated were participants in the Plan.

Before and after the sale, the Plan was managed by the Plan Administrators. The Plan Administrators were also members of the Executive Committee of the Board of Directors of Republic-Franklin Incorporated, and then Franklin Capital. As a result of this sale, 102 employees of Republic-Franklin Insurance became employees of Utica. 13 management employees remained with Republic-Franklin Incorporated, now Franklin Capital.

After January 1, 1983, the former Republic-Franklin Insurance employees were enrolled in Utica's pension plan. On January 14, 1983, the Plan Administrators effected a partial termination of the Plan by purchasing annuities for the 102 former employees of Republic-Franklin Insurance in the amount of their vested benefits. The majority of the annuities were actually paid for by January 27, 1983, but a few were not actually paid for until as late as December 5, 1983.

After the partial termination of the Plan, Franklin Capital said that it found the expenses for maintaining the Plan for 13 participants prohibitive, and thus decided to terminate the Plan. On July 20, 1983, Franklin Capital amended the Plan, so that assets remaining in the Plan after the distribution of vested benefits and termination of the Plan would not

revert to Franklin Capital. Instead, these assets would be distributed to participants and beneficiaries in the Plan. This amendment was approved by the Pension Benefit Guaranty Corporation.

On July 31, 1983, the Plan was dissolved. On August 8, 1984, the remaining 13 employees received their vested benefits. The Plan, as amended, provided in relevant part:

> Upon the direction of the Administrator at any time, the Trustee shall liquidate the Trust Fund and shall distribute to each Participant, Former Participant and Beneficiary an amount equal to the value of his allocation *as of the date such liquidation is directed*. . . .

(emphasis added). The right to residual assets in the Plan thus vested in Plan participants at the time of the Plan termination. After the distribution of vested benefits to the 13 management employees, residual assets of about $1,400,000 remained in the Plan and these residual assets were also divided among the 13 remaining management employees.

On August 28, 1987, some of the 102 employees terminated from the Plan brought suit under 29 U.S.C. § 1132 as a class action on behalf of all 102 employees against the Plan and the Plan Administrators. In an amended complaint filed December 16, 1988, the plaintiffs sought their proportionate shares of the residual assets remaining in the Plan after distribution of the vested benefits on August 8, 1984. The plaintiffs also sought relief against the Plan Administrators for their failure to administer the Plan in a non-discriminatory manner.

The discovery cut-off date was set for July 31, 1989. On May 25, 1989, the defendants filed a motion to dismiss the amended complaint, under Rule 12(b)(1), Fed. R. Civ. P. The plaintiffs filed a memorandum in opposition to this motion, and the defendants replied. On August 14, 1989, the district

court considered the defendants' motion under Rule 12(b)(6), Fed. R. Civ. P., and granted the defendants' motion to dismiss, on the ground that the plaintiffs lacked standing to bring their claim under ERISA. The district court found that the plaintiffs were not "participants" or "beneficiaries" in the Plan, as those terms are defined in ERISA, at the time the right to residual assets vested in the Plan participants and beneficiaries, and thus the plaintiffs were not authorized by statute to maintain an action for benefits. In particular, the court found that plaintiffs had received all the benefits due them under the Plan by way of the purchased annuities, and thus ceased to be participants in the Plan. The plaintiffs appealed.

II

The plaintiffs argue that the district court, without notice, looked beyond the allegations in the pleadings, namely to the Plan itself, to dismiss their case. Thus, the plaintiffs contend that the district court should have considered the defendants' motion to dismiss as a motion for summary judgment under Rule 56, and provided the plaintiffs with an opportunity to produce evidence outside the pleadings. The plaintiffs claim that they were prejudiced by the district court's failure to notify them to submit additional evidence, since they would have submitted evidence that not all the annuities were funded by the date of the Plan amendment.

We find that the district court did not look outside the pleadings, and thus properly considered the motion to dismiss under Rule 12(b)(6). The plaintiffs therefore had no right to submit additional material. In any event, the plaintiffs bore the responsibility of amending their pleadings on the basis of their belief as to the funding dates, based on the defendants' answers to interrogatories obtained late in discovery, and had sufficient time to do so. The district court did not err in failing to consider this evidence since it was not in the pleadings before the court. On the basis of those

pleadings, which did not dispute that all annuities were funded by the date of the Plan amendment, the plaintiffs could have proven no set of facts that would have entitled them to judgment.

Rule 12(b) provides, in relevant part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

The plaintiffs contend that the district court looked outside the complaint, but did not give them a reasonable opportunity to present outside material. We disagree.

We agree with the defendants that the plaintiffs incorporated the Plan into their amended complaint by quoting extensively from it. Thus, the language of the Plan, and the arguable meanings of its terms, were central to the plaintiffs' complaint, and were part of the pleadings before the district court. *See Fudge v. Penthouse International, Ltd.*, 840 F.2d 1012 (1st Cir.), *cert. denied*, _ U.S. _, 109 S. Ct. 65 (1988).

Although factual allegations must be taken as true, the court was not required to accept the plaintiffs' *legal* allegation that they were "participants" or "beneficiaries" in the Plan as true. *Blackburn v. Fisk University*, 443 F.2d 121, 124 (6th Cir. 1971). The court properly examined the terms of the Plan in regard to these allegations, and properly dismissed the plaintiffs' complaint under Rule 12(b)(6), Fed. R. Civ. P.

The plaintiffs also argue that they have been prejudiced by not having the district court consider that all the annuities may not have been funded by the July 31 Plan termination,

and that thus some of the plaintiffs may have been "participants" in the Plan at the time the residual assets vested in Plan participants.

The plaintiffs served interrogatories on the defendants, and the defendants answered these interrogatories on July 27, 1989. The defendants' answer to Interrogatory No. 21 indicated that some of the annuities may not have been funded until December 5, 1983, which was after the date of the Plan termination. The discovery cut-off date was July 31, 1989, and the district court issued its opinion on August 14, 1989.

The plaintiffs, despite opportunities to do so, never put this information before the district court in their pleadings. The plaintiffs were certainly on notice that the district court was going to rule on the defendants' motion to dismiss on the basis of the pleadings, and they further knew that the pleadings before the court did not dispute that all the annuities were funded by the date of the Plan amendment. Indeed, the plaintiffs' first amended complaint suggested that all annuities *were* funded by the date of the Plan termination:

> 10. On July 20, 1983, Defendants Cook, Matchneer and Heller, acting in their capacity as members of the Executive Committee of the Board of Directors of Franklin Capital Corporation, adopted an amendment to [the Plan] that provided that any assets remaining in the Plan after termination would not revert to Franklin Capital Corporation. Contemporaneous with this amendment, Defendants Cook, Matchneer and Heller effected the final termination of [the Plan].
>
> 12.[1] Thereafter, Defendants Cook, Matchneer and Heller, acting in their capacities as Administrators of [the Plan] directed the final distribution of the

[1]The first amended complaint has no paragraph 11.

> assets of [the Plan]. At the direction of these Defendants, *the 13 remaining Participants* in [the Plan] received not only their accrued vested benefits (approximately $600,000.00) but also all remaining assets in [the Plan] (an additional $1.5 million). On October 23, 1984, Defendant [Plan] provided information to the Pension Benefit Guaranty Corporation regarding the manner and amount of distribution.

(emphasis added). The plaintiffs suggest that the Plan had "13 remaining Participants" at the time the rights to the residual assets vested in Plan participants. This statement fails to allege that any annuities were unfunded by the date of the Plan termination.

The plaintiffs had at least two methods for presenting information on the delay in annuity funding. The plaintiffs cannot now claim that the district court erred when they did not avail themselves of either of these methods. The plaintiffs could have amended their complaint a second time, to add an allegation that not all the annuities were funded by the date of the Plan termination. Rule 15(a), Fed. R. Civ. P., provides that,

> a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Thus, the plaintiffs, after discovering that not all the annuities had been funded by July 31, 1983, the date of the Plan termination, could have amended their complaint to account for this information. The plaintiffs also could have brought this information to the attention of the district court by supplementing their memorandum opposing the defendants' motion.

Plaintiffs had over a month and a half between the date the defendants completed the interrogatories and the date

the district court handed down its opinion. They had an approximately equivalent amount of time between the cut-off date of discovery and the date of the district court's opinion. The plaintiffs thus had sufficient time to bring this information to the district court's attention. The plaintiffs, however, failed to do so, and the district court properly ruled on the complaint pursuant to Rule 12(b)(6) on the basis of the pleadings before it.

III

In dismissing the plaintiffs' complaint, the district court found that they were not "participants" or "beneficiaries" under the Plan at the time the residual assets vested in Plan participants, and thus had no standing to seek a proportionate share of these assets. On appeal, the plaintiffs contend that they have a "colorable claim" to a proportionate share of the residual assets in the Plan, and thus have standing to pursue their claim. We agree with the district court that the plaintiffs do not have a "colorable claim" to the residual assets, and thus affirm the district court's dismissal of their complaint.

The plaintiffs brought their action under 29 U.S.C. § 1132(a)(1)(B), which allows for recovery of benefits due under a plan. The Plan in question provided in relevant part:

> Upon the direction of the Administrator at any time, the Trustee shall liquidate the Trust Fund and shall distribute to each Participant, Former Participant and Beneficiary an amount equal to the value of his allocation *as of the date such liquidation is directed*. . . .

(emphasis added). Thus, it is clear from this provision that rights to residual assets vest in Plan participants only at the time the Plan is terminated.

Only "participants" and "beneficiaries," as those terms are defined under ERISA, have standing to pursue claims for benefits under 29 U.S.C. § 1132(a)(1)(B). 29 U.S.C. § 1132(a)(1).

Under ERISA, "participant" means

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7). "Beneficiary" means

> a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

29 U.S.C. § 1002(8).

In *Firestone Tire and Rubber Co. v. Bruch,* the Supreme Court elaborated on the definition of participant, stating:

> In our view, the term "participant" is naturally read to mean . . . former employees . . . who have "a colorable claim" to vested benefits. In order to establish that he "may become eligible" for benefits, a claimant must have a colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future.

489 U.S. 101, —, 109 S. Ct. 948, 957-58 (1989) (citations omitted). Thus, by virtue of their assertion that they are "participants" in the Plan, the plaintiffs argue that they have standing in this case.[2] We disagree.

---

[2]The Plan provides benefits for a "Former Participant," a term that is not defined or mentioned in ERISA. *See generally* 29 U.S.C. § 1002.

The Plan defines a "Former Participant" as

> an Employee or former Employee who was previously a Participant, whose participation in the Plan has ceased, and whose

Simply asserting that one is a participant is insufficient to gain standing to pursue benefits. Indeed, the Supreme Court in *Bruch* stated:

> To say that a "participant" is any person who claims to be one begs the question of who is a "participant" and renders the definition set forth in § 1002(7) superfluous.

489 U.S. 101, __, 109 S. Ct. 948, 957 (1989). Explicit in the Supreme Court's definition of "participant" in *Bruch* is a requirement that the plaintiffs prove either that their right to assets has "vested" or will "vest." The plaintiffs cannot prove in this case that their right to the residual assets has vested or will vest, because they were terminated from the Plan before the residual assets vested in remaining Plan participants.

Justice Scalia, concurring in the result in *Bruch*, wrote:

> I think that, properly read, the definition of "participant" embraces those whose benefits have vested, and those who (by reason of current or former employment) have some potential to receive the vesting of benefits in the future, *but not those who have a good argument that benefits have vested even though they have not.*

109 S. Ct. at 959 (Scalia, J., concurring) (emphasis added). Quite simply, in this case, the residual assets remaining in

---

> Period of Vesting Service and Period of Benefit Service is not disregarded.

We find that this definition of a "Former Participant" in the Plan is identical to the definition of a "Participant" under ERISA, particularly in light of *Bruch*, which defines a Participant as, *inter alia*, a former employee with a "colorable claim" to vested benefits he has not yet received. Thus, we consider our discussion of participants in the Plan to encompass the Plan's definition of "Former Participant."

the Plan after the August 8, 1984 distribution vested only in those participants (and their beneficiaries) who were participants in the Plan at the time of the Plan termination on July 21, 1983.

The plaintiffs, and the class they purport to represent, ceased to be participants in the Plan in January 1983, at the time of the partial termination of the Plan based on the purchase of annuities for them. The Plan purchased annuities for the plaintiffs in the amount of their vested benefits; in this regard, we note that the Department of Labor regulations interpreting ERISA specifically exclude from the definition of "participant" "an individual to whom an insurer has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan." 29 C.F.R. § 2610.2 (1989). Similarly, the Fifth Circuit has held that the definition of "participant"

> excludes retirees who have accepted the payment of everything due them in a lump sum, because these erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments.

Joseph v. New Orleans Electrical Pension & Retirement Plan, 754 F.2d 628, 630 (5th Cir.), *cert. denied*, 474 U.S. 1006 (1985). The plaintiffs here have also "accepted the payment of everything due them" under the Plan at the time their participation in it terminated, albeit in the form of an annuity and not in a lump sum. They are due no more benefits. Thus, in no respect can any of the residual assets be characterized as being "vested" in the plaintiffs.

The plaintiffs cite two cases in support of their claim that they have standing to pursue this claim. We are persuaded, however, that neither case is applicable to this action. In *Amalgamated Clothing & Textile Workers v. Murdock*, 861 F.2d 1406 (9th Cir. 1988), plaintiffs sued for a proportionate share of residual assets that had not vested in them. These

residual assets had collected in the plan as a result of the plan fiduciary's greenmailing activities.

The theory behind the holding in *Amalgamated Clothing* is inapplicable to this case. The Ninth Circuit "equitably" vested residual assets in plan participants to allow these participants to seek legal recourse against the plan fiduciaries, in an effort to combat illegal activities of plan administrators:

> In the circumstances of this case, were we to hold that payment of plan benefits cuts off the standing to sue of plan beneficiaries, we would, in effect, be saying that a fiduciary who (1) breaches the duty of loyalty to an ERISA plan, and (2) seeks to profit personally from that breach by terminating the plan, has the power to deprive plan beneficiaries of standing to sue the fiduciary for misuse of the plan assets.

Amalgamated Clothing & Textile Workers v. Murdock, 861 F.2d 1406, 1418 (9th Cir. 1988). We see no similar misuse of Plan funds in this case. The residual assets were not created by greenmail or other illegal means, nor have the plaintiffs claimed that they were. Rather, these residual assets apparently existed as a result of the sale of Republic-Franklin Insurance Company.

In support of their argument that *Amalgamated Clothing* is applicable to this case, the plaintiffs contend that the Plan Administrators breached their fiduciary duty by terminating them from the Plan, and then amended the Plan to vest the right to receive residual assets in the remaining 13 Plan participants. However, this allegation does not go to misuse of Plan *funds*, funds that were held in trust for Plan participants, but rather impropriety in the Plan management. This distinction takes the plaintiffs' allegations out of the realm of the *Amalgamated Clothing* holding. Accordingly, we refuse to extend the holding in *Amalgamated Clothing*, which was a "limited" one by that court's own admission, to the present situation.

Without commenting on the plaintiffs' breach of fiduciary duty claim, we note that, in amending the Plan, the Plan Administrators did not violate any express term of the Plan. The *Amalgamated Clothing* court pointed out that the reversion of residual assets to the company did not, absent misuse of plan assets, constitute a violation of ERISA. *Amalgamated Clothing & Textile Workers v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988). If residual assets may properly revert to the company, we see no reason why they may not revert to plan participants as well.

The plaintiffs also point to an unpublished decision of this court in *Rosenbaum v. Davis Iron Works,* No. 88-1245 (6th Cir. April 19, 1989), in support of their position. In that case, the plaintiff was a retiree, whose lump sum benefit payment was kept in a segregated account maintained by the plan. *Rosenbaum*, slip op. at 3. The plaintiff sued the plan's sponsor for additional benefits he claimed were due under the terms of the plan.

The *Rosenbaum* court noted that the plaintiff had a claim for benefits under the terms of the plan, stating:

> Even someone who has ostensibly received all his benefits should be able to sue in a case such as this because the suit is for benefits the claimant was allegedly entitled to under the plan. Any other ruling would allow plan administrators to take benefits from plan recipients and then become immune to suit by paying beneficiaries *some* of the benefits to which they were entitled, while falsely representing that the amount paid was the full amount of benefits due.

Rosenbaum, slip op. at 7 (emphasis added).

The plaintiffs in this case similarly argue that they have an entitlement to benefits under the Plan. As Justice Scalia noted in *Bruch*, however, this allegation of entitlement must

have some basis in the Plan itself: "participants" do not include "those who have a good argument that benefits have vested even though they have not." *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, _, 109 S. Ct. 948, 959 (1989) (Scalia, J., concurring). The plaintiffs in this case cannot demonstrate entitlement to residual assets under the terms of the Plan. Not until the July 31 termination of the Plan did rights to the residual assets vest in participants of the Plan; by this date, the plaintiffs were no longer participants, since they received *all benefits* that they were due under the Plan *at the time their participation in the Plan terminated,* unlike the plaintiff in *Rosenbaum* who had received, at most, only *some* of his benefits. It is of no consequence to the plaintiffs that the Plan was later amended to vest rights to residual assets in Plan participants at the time of the Plan termination.

Plaintiffs argue that the July 20, 1983 amendment to the Plan was retroactive to January 1, 1980. This contention, however, does not help their case. Rights to the residual assets, regardless of the date of amendment, vest in Plan participants only as of the date of the Plan termination.

The plaintiffs in this case are not beneficiaries. As the district court pointed out, and we agree, the rights of beneficiaries are derivative from the rights of participants. Since the plaintiffs are not participants, they are not beneficiaries. We find nothing in the Plan that designates plaintiffs as beneficiaries, nor is there any allegation that any participants in the Plan at the time of its termination have designated plaintiffs to be their beneficiaries.

The result we reach in this case is compelled under the applicable law. We recognize that the actions of the Plan Administrators may appear to constitute unjust enrichment and that the plaintiffs appear to have been deprived of benefits that would have been theirs had the Plan been terminated earlier. However, ERISA simply does not give to persons in the plaintiffs' position standing to contest such actions, and

since the Administrators were not guilty of unlawful conduct in pursuing the course they did, we have no basis to disturb the result.

Accordingly, the judgment of the district court is AFFIRMED.[3]

[3]On appeal, the defendants contend that money damages cannot be recovered from the Plan Administrators under the cause of action asserted by the plaintiffs. In addition, the appellees have moved to dismiss unnamed appellants, because the notice of appeal in this case listed appellants only as "Donna Teagardener, et al." In light of our holding that the plaintiffs do not have standing in this case, however, we find it unnecessary to address these claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Donna Teagardener,
et al.,

Plaintiffs,

vs.

Case No. C2-87-1047
JUDGE GRAHAM

Republic Franklin
Incorporated Pension
Plan, et al.,

Defendants.

OPINION AND ORDER

This matter is before the Court on the motion of defendants Republic Franklin Incorporated Pension Plan ("RFIPP"), William C. Cook, William W. Matchneer, and John F. Heller, Jr. to dismiss the plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(1) on the ground that the plaintiffs lack standing to bring this action under federal law. Also pending is the plaintiffs' motion to certify this action as a class action.

James W. Miller originally brought this action on behalf of himself and the other

participants in the RFIPP who were terminated during a partial termination of the plan in 1983. Donna Teagardener,[1] Charles Seipel, W.C. Wickum, and George T. Stick were substituted as plaintiffs for Miller by amended complaint on December 16, 1988. In all other respects the amended complaint is identical to the original complaint. Plaintiffs' claims are brought pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1132(a)(1)(B), and plaintiffs seek to invoke this Court's subject matter jurisdiction pursuant to 29 U.S.C. Section 1132(e) and 28 U.S.C. Section 1331.

Defendants contest this Court's jurisdiction on the ground that plaintiffs are not covered by ERISA, and therefore, their

---

1. In the Amended Complaint, this plaintiff is listed as "Donna Teagarden," but all subsequent pleadings by both plaintiffs and defendants refer to her as "Donna Teagardener."

lack of standing to bring this action under federal law deprives the Court of subject matter jurisdiction. However, a finding on one element of the merits, coverage under ERISA, is a necessary precursor to the determination of this Court's subject matter jurisdiction. Therefore, the merits of the case are intertwined to a degree with the issue of subject matter jurisdiction. In most situations such as this, courts have held that the appropriate procedure is to assume subject matter jurisdiction for purposes of determining whether the factual basis of the merits can survive a Rule 12(b)(6) motion. See 2A J. Moore & J. Lucas, MOORE'S FEDERAL PRACTICE Para. 12.07[2.-1] & n. 22 (2d ed. 1987).

Although the United States Court of Appeals for the Sixth Circuit has not decided this issue, it faced a similar situation in Rogers v. Stratton Industries, Inc., 798 F.2d 918, 916-18 (1986). In

Rogers the Sixth Circuit concluded that the outcome in that case would be the same whether analyzed under Rule 12(b)(1) or under Rule 12(b)(6). Since proceeding under Rule 12(b)(6) would be more favorable to the plaintiff, the Sixth Circuit construed the motion as a Rule 12(b)(6) motion. Therefore, this Court will consider the defendants' motion as having been brought under Rule 12(b)(6).

A complaint is sufficient to withstand dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The complaint must be construed in the light most favorable to the plaintiff, and the allegations contained therein must be accepted as true. Scheuer v. Rhodes, 416 U.S. 232, 236

(1974); Gardner v. Toilet Goods Association, 387 U.S. 167, 172 (1967).

The facts of this case were summarized in the Court's December 22, 1988 opinion and order denying the defendants' motion for summary judgment.

> Plaintiff was employed by a subsidiary of Franklin Capital Corporation prior to 1983. Franklin Capital Corporation sponsored a pension plan, in which plaintiff participated, on behalf of its employees and the employees of its affiliated subsidiaries. That pension plan was the RFIPP. In January of 1983, Franklin Capital Corporation sold the subsidiary with which plaintiff was employed to an independent corporation. Shortly thereafter, plaintiff and certain other employees who had participated in the pension plan and had vested rights therein were terminated as part of a partial termination of the plan. The plan purchased annuities for these participants as payment of the accrued vested benefits to which each participant was entitled. After this partial termination, the plan retained assets valued at approximately \$2,000,000.00. Only thirteen participants remained after this partial termination and their vested benefits totaled approximately \$600,000.00.

> The terms of the pension plan originally provided that any residual amounts remaining in the trust fund after satisfaction of all liabilities and payment of benefits upon termination of the plan would revert to the plan sponsor, Franklin Capital Corporation. The plan was amended on July 20, 1983 by defendants Cook, Matchneer and Heller, acting in their capacity as members of the executive committee of the board of directors of Franklin Capital Corporation, to provide that any residual assets would not revert to Franklin Capital Corporation. Sometime thereafter, defendants Cook, Matchneer and Heller allocated, and later distributed, the remaining $2,000,000.00 among the remaining thirteen participants.

Id. at 1-2. These findings hold true for the instant plaintiffs as well, since they are in the same position as was the original plaintiff, James W. Miller.

The plaintiffs' claims are all brought pursuant to 29 U.S.C. Section 1132(a)(1)(B) and were summarized by the Court in its December 22, 1988 opinion and order as follows:

> The first claim is that the affected class was entitled to share in the disbursement of the residual assets of the trust funds pursuant to 29 U.S.C. Section 1344(a)(6). The second claim is that the affected class was entitled to share in the distribution of the residual assets pursuant to the terms of the pension plan agreement. The final claim is that defendants Cook, Matchneer and Heller, in their capacity as administrators of the RFIPP, failed to include the members of the affected class in the distribution of residual assets in violation of 29 U.S.C. Section 1344.

Id. at 2-3.

According to 29 U.S.C. Section 1132(a) (emphasis added),

> A civil action may be brought --
>
> (1) by a participant or beneficiary --
>
> ...
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

Only participants and beneficiaries, therefore, have standing to bring an action under 29 U.S.C. Section 1132(a)(1)(B). The term "participant" is defined at 29 U.S.C. Section 1002(7) as follows:

> [A]ny employee or <u>former employee of an employer,</u> or any member or former member of an employee organization, <u>who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer</u> or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

<u>Id.</u> (Emphasis added). "The term 'beneficiary' means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. Section 1002(8).

The Supreme Court of the United States has recently had occasion to interpret the meaning of "participant" as defined in 29 U.S.C. Section 1002(7). <u>Firestone Tire and</u>

Rubber Co. v. Bruch, 57 U.S.L.W. 4194 (U.S. Feb. 21, 1989),

> In our view, the term "participant" is naturally read to mean either "employees in, or reasonably expected to be in currently covered employment," Saladino v. I.L.G.W.U. National Retirement Fund, 754 F.2d 473, 476 (CA2 1985), or former employees who "have...a reasonable expectation of returning to covered employment" or who have "a colorable claim" to vested benefits. Kuntz v. Reese, 785 F.2d 1410, 1411 (CA9) (per curiam), cert. denied, 479 U.S. 916 (1986). In order to establish that he "may become eligible for benefits," a claimant must have a colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future.

Id. at 4198-99.

In the instant case, plaintiffs do not have a reasonable expectation of returning to covered employment as the company by which they were employed has been sold. The only possibility for the plaintiffs to establish standing is if they can demonstrate that they have a colorable claim to vested benefits.

Under ERISA the allocation of assets among participants and beneficiaries upon the termination of a benefit plan is governed by 29 U.S.C. Section 1344(a). All vested and nonforfeitable benefits are to be distributed in the order of priority set forth in that subsection. The provision upon which the plaintiffs rely is 29 U.S.C. Section 1344(a)(6), which states that the last priority for allocation plan assets to cover benefit obligations is "Sixth, to all other benefits under the plan." Id. (Emphasis added). Therefore the source of plaintiffs' rights, if any, to the residual assets must flow from the pension plan agreement.

Plaintiffs base their right to share in the distribution of residual assets on sections 12.3 and 12.4 of the RFIPP, which provide as follows:

> 12.3 End of Contributions. Upon termination of the Plan, the Employer shall not be obligated to make further contributions to

the Trust except as required by law and the Trust Fund shall be allocated by the Trustee among Participants, Former Participants and Beneficiaries in accordance with applicable law.

12.4 Distribution on Termination. Following allocation of the Trust Fund pursuant to Section 12.3 above and until directed by the Administrator to liquidate the Trust Fund, the Trustee shall continue the Trust for the benefit of the Participants, Former Participants and Beneficiaries who have received allocations hereunder and, to the extent allowed by the amount of each such allocation and its proportionate share of the income and expense of the Trust thereafter shall pay benefits to such Participants, Former Participants and Beneficiaries pursuant to provisions of the Plan in effect on the date of termination as if the Plan had not been terminated. Upon the direction of the Administrator at any time, the Trustee shall liquidate the Trust Fund and shall distribute to each Participant, Former Participant and Beneficiary an amount equal to the value of his allocation as of the date such liquidation of the Trust Fund may be made, in whole or in part, to the extent that no discrimination in value results, in cash, in securities, and other assets in kind, or in nontransferable annuity contracts, as the Administrator in its sole

> discretion shall determine. All non-cash distributions shall be valued at fair market value as of a date not more than 30 days prior to the date of distribution, as determined by the Administrator.

According to the plaintiffs, each of them was a participant, former participant, or beneficiary at the time of the final termination of the RFIPP, and thus, eligible to participate in the final distribution of residual assets.

Under the RFIPP at section 1.34, a "participant" is defined as "an Employee whose participation in the Plan has commenced and has not yet ceased." A "former participant" is defined as "an Employee or former Employee who was previously a Participant, whose participation in the Plan has ceased, and whose Period of Vesting Service and Period of Benefit Service is not disregarded." RFIPP at section 1.26.

> "Beneficiary" shall mean a Participant's or Former Participant's Death Beneficiary, his Joint Pensioner or any other Person (other than such Participant or Former

> Participant) who is or becomes entitled under the Plan, or under an option or options provided for herein or permitted by the terms hereof, to receive any part or all of a pension or other benefit payable hereunder with respect to such Participant or Former Participant.

RFIPP at section 1.6.

The plaintiffs' participation in the RFIPP ceased during the early part of 1983 when annuities were purchased in payment of their accrued vested benefits as part of a partial termination of the plan. At this time, plaintiffs ceased being participants in the RFIPP. Although employees whose participation in the plan has ceased may be classified as former participants, this classification is available only to those "whose Period of Vesting Service and Period of Benefit Service is not disregarded." Plaintiffs have not identified nor has this Court located, upon review of the plan agreement, any basis for a finding that plaintiffs' periods of vesting service and

periods of benefit service have not been disregarded. Finally, plaintiffs cannot be considered as having been beneficiaries as the right to benefits in this capacity is derivative from the rights of participants or former participants, and the plaintiffs have not identified any participants or former participants from which they derive the right to benefits.

The Department of Labor regulations at 29 C.F.R. Section 2618.30(a) allow for allocation of residual assets to the employer if the plan agreement so provides on the date of plan termination. If the requirements of that subsection are not met, then the assets are to "be allocated among the pool of eligible participants and beneficiaries in accordance with Section 2618.32(a)." 29 C.F.R. Section 2618.30(b). In the instant case, the plan agreement did at one time provide for allocation of the residual assets to the employer, Franklin

Capital Corporation. However, this provision was removed from the plan agreement prior to the final termination. Therefore, these regulations are not applicable to the instant case. In any event, "eligible participants and beneficiaries," although not defined by the regulations, must be determined, as under ERISA, by reference to the terms of the plan agreement in effect at the time of the plan's termination. The terms of the RFIPP at the time of termination did not confer upon the plaintiffs the right to participate in the distribution of residual assets.

Morse v. Adams, 857 F.2d 339 (6th Cir. 1988), a case upon which plaintiffs rely, is distinguishable from the instant case because in that case there was a colorable claim to benefits based on contractual provisions. Id. at 342. See also Saladino v. I.L.G.W.U. National Retirement Fund, 754 F.2d 473, 477 (2d Cir. 1985). In Joseph

v. New Orleans Electrical Pension & Retirement Plan, 754 F.2d 628 (5th Cir.), cert. denied, 474 U.S. 1006 (1985), retired employees who had chosen to receive lump sum retirement benefits in satisfaction of their accrued vested rights were held not to be "participants" for purposes of ERISA even though the plan agreement was subsequently amended to pass on to later retirees the investment surplus which the fund had generated. Id. at 629-30. This amendment increased a participant's past service credit eight-fold. The plaintiff retirees were held not to be "participants" because the plan agreement did not make the amendments retroactive to cover the plaintiffs. Id. at 630. The fact that the instant plaintiffs did not choose a lump sum distribution but received annuities as dictated by the plan administrator is irrelevant. The purchase of annuities was authorized by the RFIPP at section 12.2.

The right to share in the distribution of residual assets is a matter of contract. Franklin Capital Corporation, the employer, could have and indeed at one time was designated by the RFIPP as the recipient of all the residual assets. The executive committee of the Franklin Capital Corporation amended the RFIPP to remove this designation, then proceeded to effect partial termination of the plan, and finally allocated the residual assets to the remaining participants. This course of action reached the same result that reversion to Franklin Capital Corporation and then distribution to the people who were remaining participants would have reached. Any problems with this latter course of action may have affected the shareholders of the Franklin Capital Corporation, but not the instant plaintiffs.

Plaintiffs have failed to allege any basis for the right to share in the distribution of the residual assets. Therefore,

the Court concludes that plaintiffs are not "participants" or "beneficiaries" for purposes of ERISA, and therefore, lack standing to bring this action. Since plaintiffs lack standing, this Court does not have subject matter jurisdiction, and this action must be dismissed.

In conclusion, the defendants' motion to dismiss is GRANTED. In light of this ruling, the plaintiffs' pending motion to certify this action as a class action is MOOT.

It is so ORDERED.

JAMES L. GRAHAM
United States District
Judge

DATE: August 14, 1989